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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NICK MILETAK, Plaintiff and Appellant, v. JEFF DAVI, as Real Estate Commissioner, etc., Defendant and Respondent.	H033753 (Santa Clara County Super.Ct.No. CV116866)

Appellant Nick Miletak appeals from the trial court's denial of his petition for writ of mandate by which he sought relief from the California Department of Real Estate's administrative denial of his application for a real estate salesperson's license. The trial court denied relief based on several procedural grounds, including that Miletak had failed to obtain an administrative record for the court to review. Finding ourselves equally hampered by the absence of an administrative record, and the additional absence of an adequate appellate record, we affirm the trial court's order.

The trial court also denied Miletak's motion for reconsideration of the writ denial, and he appeals from that denial as well. But because the denial of a motion for reconsideration is a nonappealable order, we dismiss the appeal to the extent it is taken from that order.

STATEMENT OF THE CASE[1]

In 2003, Miletak submitted a prior application for a real estate salesperson's license that was denied. The Commissioner then found that Miletak had been convicted of certain crimes involving dishonesty (disturbing the peace, grand theft, burglary, and perjury) and that the crimes had been committed over a lengthy period amounting to "serious anti-social behavior extending for almost a decade." Although the Commissioner also then found that Miletak was well on the path toward rehabilitation, he noted that Miletak would be on probation until 2005 and that the "nature and recency of the offenses" were such that "it would be against the public interest to grant him a real estate license" at that time.

Miletak again applied for a real estate salesperson's license in 2007. The application process wound its way to an administrative hearing before the Department of Real Estate in March 2008. The ALJ issued a five-page Proposed Decision filed May 14, 2008, denying the application.

Rejecting Miletak's contention that he had been fully rehabilitated from his prior criminal activities, the ALJ noted that Miletak had failed to disclose his conviction for disturbing the peace in his current application in response to a direct question about misdemeanor or felony convictions not involving minor traffic citations. Miletak later disclosed the conviction after it was brought to his attention but contended the then 20-year old conviction at that point was "irrelevant." Miletak also failed to disclose in his application that he had been a defendant in a civil action that had resulted in a restraining

[1] We take the facts from the May 14, 2008 Proposed Decision of the Administrative Law Judge (ALJ) denying Miletak's application for a real estate salesperson's license. We assume the Proposed Decision was ultimately adopted by respondent Jeff Davi as the Commissioner of the Department of Real Estate. We have taken judicial notice of the Proposed Decision by separate order on respondent's request therefor as there is no administrative record before us of which the Proposed Decision would naturally be a part.

order against him in response to a direct question about such matters. The ALJ acknowledged Miletak's efforts toward rehabilitation and his educational and work-related pursuits in the time since his criminal convictions. But in the end, the ALJ concluded that Miletak's crimes involved moral turpitude that was substantially related to the qualifications, functions, or duties of a real estate licensee; that his criminal convictions demonstrated a pattern of repeated and willful disregard of the law; that he had made material misstatements of fact in his application; and that he displayed in his application a lack of attention to detail required of real estate licensees and a lack of regard for the Department's legitimate regulatory role by his assertion that his prior conviction was "irrelevant" to his application. Based on all these circumstances, the ALJ concluded that the protection of the public again warranted the denial of Miletak's application.[2]

Miletak challenged the Commissioner's ultimate denial of his application by petition for writ of administrative mandate filed in the superior court on July 8, 2008.[3] In connection with this filing, Miletak obtained a court order relieving him from paying court fees and costs under former Government Code section 68511.3. The matter was initially set for hearing on August 19, 2008. Before that date, respondent's counsel inquired whether Miletak had designated the administrative record as required for judicial review of agency decisions by Government Code section 11523 and confirmed that he had not.[4] Based on the absence of a record, respondent's counsel requested Miletak to continue the hearing, but he declined to do so. He also tried to have the administrative

[2] The ALJ also cited Business and Professions Code section 10177 and former section 480 as well as title 10, section 2910 of the California Code of Regulations involving the Department of Real Estate in support of the denial.

[3] Neither the petition nor respondent's answer to it is part of the record on appeal.

[4] This section also provides that the petitioner must initially pay the fee for the preparation of the record.

record prepared by shifting the costs thereof to the Department of Real Estate based on the initial order waiving his court fees and costs, not understanding that the initial waiver, without a further court order, did not extend to costs for preparation of the administrative record.[5] But respondent's counsel indicated to the court reporter involved with the administrative hearing that the Department would not pay for the transcript absent a court order requiring it to do so. The court reporter apparently then stopped preparation of the hearing transcript.

Consequently, at the hearing on Miletak's petition for writ of mandate, the court confirmed that it did not have the administrative record. The court also observed that Miletak's petition was not verified as required by Code of Civil Procedure section 1086 and it was lacking points and authorities. With these procedural deficiencies, the court observed that there was no basis for it to issue a writ of mandate, and it denied the petition from the bench.

Miletak then filed a motion for reconsideration under Code of Civil Procedure section 1008, asserting as its basis that respondent's counsel had "acted unethically and [had] interfered with his ability to obtain" the administrative hearing transcript. Respondent opposed the motion and the court denied it, confirming that it had initially denied Miletak's writ petition because "there was not sufficient evidence or [a] record warranting" that relief.

The court's later written order, entered December 5, 2008, denied both the petition for writ of mandate, no written order having previously done so, and the motion for reconsideration. As to denial of relief in mandate, the order specifically cited Miletak's

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[5] Although Code of Civil Procedure section 1094.5 permits shifting costs of the administrative record through in forma pauperis proceedings under the Government Code, it is clear under rules 3.55 and 3.56 of the California Rules of Court that an initial waiver of court fees and costs would not extend to these costs. To be relieved of the cost of the administrative record, Miletak was required to submit an additional waiver application that was also subject to court approval.

failure to comply with rule 3.1140 of the California Rules of Court, which requires a party intending to use an administrative record in a mandate proceeding to lodge the record with the court at least five days before the hearing. As to the motion for reconsideration, the order stated that Miletak had failed to prove that respondent's counsel had "somehow directed a court reporter to stop preparing the transcript of the underlying administrative hearing." The order further cited continuing "procedural problems" with the petition, including that Miletak had still not "produced a sufficient record of the administrative proceedings to establish the alleged grounds" for relief in mandate and therefore that the "presumptions that [the Department of Real Estate] regularly performed its duties, and of the regularity of the administrative proceedings, must prevail."

Miletak timely appealed from the order.

DISCUSSION

I. *Appealability*

No judgment was entered in this case. As we have previously observed, "[o]rdinarily, an appeal must be taken only from a final judgment, even in a mandamus action. [Citations.] However, there is also case law to the effect that an order denying a petition for writ of mandamus that effectively disposes of the action because no issues remain to be determined is also appealable. [Citations.]" (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1056 (*JKH*).) Here, to the extent the order denies the petition for writ, it appears to have terminated the trial court proceedings. We will accordingly treat the order denying the petition as an appealable judgment.

Miletak has briefed the case as though an order denying a motion for reconsideration is also appealable, generally contending that the trial court erred by denying his motion and raising three other specific issues that are all related to that

motion and not the original denial of his writ petition.[6] But as we recently observed, "[t]here is a split of authority as to whether an order denying a motion for reconsideration is separately appealable. (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 80-81.) The relatively recent enactment of rule 8.108(d) did not resolve this split of authority. The Advisory Committee comment to rule 8.108(d) of the California Rules of Court states that the revised rule takes no position on 'whether an order denying a motion to reconsider is itself appealable (compare *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 710-711 [order appealable if motion based on new facts] with *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d [1151,] 1160-1160 [*sic*] [order not appealable under any circumstances][but see *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1605]).' The Advisory Committee comment states that whether such an order is separately appealable is a 'legislative matter[].' (Advisory Com. com., California Rules of Court, rule 8.108(d).) The Legislature has yet

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[6] In addition to generally contending that the trial court should have granted reconsideration, he also contends that respondent's counsel was not "correct in ordering a cease to processing of the administrative record," that there was a procedural error in that he did not receive a pleading responsive to his petition before the initial hearing on his writ petition, and that he suffered prejudice as a result of respondent's counsel's actions. But there was no evidence relating to these matters before the court in connection with the original writ denial, only on the motion for reconsideration. We therefore perceive these issues to be raised in connection with Miletak's appeal from denial of reconsideration rather than his appeal from the denial of his writ petition. We requested Miletak to show cause why the appeal from the order denying reconsideration should not be dismissed. He has responded that the denial of reconsideration here should be considered an order after judgment that is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). But as we have already observed, there was no judgment entered in this case and the order denying the petition for writ, which we are broadly construing as an appealable judgment for Miletak's benefit, also denied the motion for reconsideration. In other words, here, there was no order that is appealable as an order rendered *after* judgment. Further, as we explain below, we agree with this court's analysis in *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 968 (*Morton*) and other cases cited there as to why orders denying motions for reconsideration are not appealable.

to take a position on whether an order from a motion to reconsider is separately appealable." (*Morton, supra,* 156 Cal.App.4th at p. 968.)

"The majority of recent cases have concluded that orders denying motions for reconsideration are *not* appealable, *even* where based on new facts or law. (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1458-1459; see also *In re Marriage of Burgard, supra,* 72 Cal.App.4th at pp. 80-81.) These courts have concluded that orders denying reconsideration are not appealable because 'Section 904.1 of the Code of Civil Procedure does not authorize appeals from such orders, and to hold otherwise would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal.' (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1242; see also *Crotty v. Trader* (1996) 50 Cal.App.4th 765, 769; *Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 210; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 333, fn. 1; *Estate of Simoncini* (1991) 229 Cal.App.3d 881, 891; *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1550, fn. 2.)" (*Morton, supra,* 156 Cal.App.4th at pp. 968-969.)

Nothing about the circumstances of this case convinces us to disregard the reasoning in Morton and the cases on which it relies. We therefore conclude that to the extent the trial court's order here denied Miletak's motion for reconsideration, it is *not* an appealable order, and we accordingly dismiss the appeal to that extent, declining to reach the merits of any issue related thereto. (*Annette F. v. Sharon S., supra,* 130 Cal.App.4th at p. 1459; *Morton, supra,* 156 Cal.App.4th at p. 969.)

II. *Standard of Judicial Review*

We accordingly confine our review to the trial court's order denying Miletak's petition for writ of mandate. Miletak has raised no specific issues in connection with the making of that order in his briefing. We nevertheless set out the applicable standard of judicial review.

A superior court's review of an agency's adjudicatory decision under Code of Civil Procedure section 1094.5 "is subject to two possible standards depending on the nature of the rights involved. [Citation.] If the administrative decision involved or substantially affected a 'fundamental vested right,' the superior court exercises its independent judgment upon the evidence disclosed in a limited trial de novo in which the court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence. [Citations.] . . . [¶] Where no fundamental vested right is involved, the superior court's review is limited to examining the administrative record to determine whether the adjudicatory decision and its findings are supported by substantial evidence in light of the whole record. [Citation.]" (*JKH, supra*, 142 Cal.App.4th at pp. 1056-1057, fns. omitted.) In either case, the court must undertake to review the administrative record.

"Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard. [Citations.] But depending on whether the trial court exercised independent judgment or applied the substantial evidence test, the appellate court will review the record to determine whether either the trial court's judgment or the agency's findings, respectively, are supported by substantial evidence. [Citation.] If a fundamental vested right was involved and the trial court therefore exercised independent judgment, it is the trial court's judgment that is the subject of appellate court review. [Citations.] On the other hand, if the superior court properly applied substantial evidence review because no fundamental vested right was involved, then the appellate court's function is identical to that of the trial court. It reviews the administrative record to determine whether the agency's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them. [Citations.] [¶] If the administrative findings are supported by substantial evidence, the next question is one of law—whether those

findings support the agency's legal conclusions or its ultimate determination. [Citation.]" (*JKH, supra*, 142 Cal.App.4th at pp. 1058-1059, fn. omitted.)

III. *Miletak Has Failed to Demonstrate Error With an Adequate Record*

As noted, where no fundamental vested right is involved, an appellate court's review of a trial court's ruling in mandate under Code of Civil Procedure section 1094.5 rests on the administrative record. An application for a real estate salesperson's license does not involve a vested right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144 [fundamental vested right is one that is already possessed as opposed to one that is not yet acquired and merely sought]; *Coldwell Banker & Co. v. Department of Insurance* (1980) 102 Cal.App.3d 381, 406-407.) Thus, judicial review here, whether in the trial court or the court of appeal, requires and is generally confined to the administrative record. (Code Civ. Proc., § 1094.5, subds. (a), (c), & (e); *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578; *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 771.) If a petitioner does not provide the record, or provides an inadequate record, the petition may be denied for failure to meet the petitioner's burden of proof.[7] (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 354; *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 453 [responsibility for producing administrative record lies with petitioner].)

In addition to the absence of an administrative record, our review is also constricted here by the absence of the trial court pleadings in the appellate record

[7] In limited circumstances a petitioner may be excused from producing the entire record when the sufficiency of the evidence to support the administrative decision is not in issue. And on occasion, a court may review a matter without the entire administrative record if the relevant facts are adequately pleaded in the petition and admitted in the answer. (*Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657, 660.) But, because the appellate record here does not include the petition or the answer, we do not know what exactly is in issue and we are not in a position to apply either of these exceptions to the requirement that when proceeding in mandate, a petitioner must produce the entire administrative record.

demonstrating what, if any, issues have been preserved for appeal. Issues that have not been raised in the petition for writ of mandamus may be deemed waived on appeal. (*Noguchi v. Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1540.) And in its initial oral denial of the writ, the trial court noted that Miletak's petition for writ was not verified and that it did not include points and authorities, procedural deficiencies that in addition to the lack of an administrative record, formed the basis of the court's view that there was no basis on which to issue a writ. Without an appellate record including the pleadings, we are not in a position to evaluate or review the basis of the court's reasoning in this regard.

Because Miletak has raised no specific issues directly relating to the writ denial (as opposed to the denial of reconsideration),[8] and further because we are unable to properly review the denial of relief in mandate without adequate administrative and appellate records, we affirm the trial court's order denying Miletak's petition for writ of mandate.

[8] He does contend that there was procedural error in that he did not receive a responsive pleading before the initial writ hearing. But this claimed error was not raised until the later motion for reconsideration. Moreover, as observed by the trial court, absent a basis for writ relief in the first place by a prima facie showing in the petition, the absence of an answer is immaterial to the denial of writ relief.

DISPOSITION

To the extent the trial court's order denied Miletak's writ petition, it is affirmed. To the extent the order denied Miletak's motion for reconsideration, we partially dismiss the appeal as being from a nonappealable order.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.